

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SAN DIEGO UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2015050873

DECISION

On May 22, 2015, District filed a Due Process Hearing Request (complaint) with the Office of Administrative Hearings naming Student. The complaint was amended on District's motion on June 10, 2015. The matter was continued for good cause on July 7, 2015.

Administrative Law Judge Chris Butchko heard this matter in San Diego, California, on July 8, 2015.

Sarah Sutherland, Attorney at Law, represented District. Pamela Townsend, attorney at Law, attended and assisted Ms. Sutherland. Jennifer Parks Orosco, Program Manager for District, attended the hearing on behalf of District.

No appearances were made on behalf of Student at hearing.

On July 23, 2015, District submitted its closing brief, the record closed, and the matter was submitted for decision.

ISSUES¹

1. Was District's February 9, 2015, psychoeducational assessment appropriately conducted?

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

2. Was District's April 2, 2015, mental health related services assessment appropriately conducted?

3. Did District appropriately find that Student was not eligible for special education and related services, pursuant to its May 13, 2015, individualized education program?

SUMMARY OF DECISION

District met its burden of proof by showing its psychoeducational and mental health related services were administered by trained and knowledgeable persons, using a variety of appropriate technically sound, valid, and reliable instruments, tools and strategies, and met all legal requirements. Accordingly, Student is not entitled to independent educational evaluations at public expense.

District has not carried its burden of proof to establish that Student is not eligible for special education services due to other health impairment, specific learning disability, or emotional disturbance.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student was a 17-year-old female who at all relevant times resided with her parents within District's boundaries. Student has been and continues to be eligible for accommodations under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) for diabetes ("504 plan").

2. Student had an individualized educational program plan when she was in kindergarten under the eligibility category of other health impairment due to her diabetes. Subsequently, her diabetic condition was managed for educational purposes through a 504 plan.

3. Student disenrolled from District in first grade and since that time attended a combination of non-public schools and homeschooling.

4. Student enrolled in the District for twelfth grade.

Assessment Request

5. On September 22, 2014, Parents requested in writing that Student be assessed for psychoeducational functioning.

6. District prepared an assessment plan and asked Parents to sign and return the plan by October 7, 2014.

7. Parents initially did not sign the assessment plan, and District sent parents an e-mail every few weeks asking them to execute and return the assessment plan.

8. Parents signed the assessment plan on December 3, 2014, at a meeting on Student's 504 plan.

District's Psychoeducational Evaluation

9. Blaire Johnson is District's school psychologist who performed the psychoeducational assessment of Student. Ms. Johnson has a bachelor of arts degree in Psychology from San Diego State University and a master of arts degree in Educational Psychology from Loyola Marymount University. She received a pupil personnel services credential in 2007, which qualified her to work as a school psychologist.

10. Ms. Johnson has worked for District as a school psychologist since receipt of her credential, and she has worked full-time at Student's high school of attendance for the last three years.

11. During her tenure at District, Ms. Johnson has averaged between 60 and 75 psychoeducational assessments per year. She has conducted approximately 500 assessments.

12. Ms. Johnson was knowledgeable about, and trained in, administering standardized assessment instruments. She was qualified to administer the assessment based on her education, training, credentials, and experience.

13. She conducted the psychoeducational assessment of Student in December 2014 and January 2015.

14. Ms. Johnson assessed Student through the use of records review, caregiver interviews, direct observation, and standardized testing. Student was in good academic standing at her high school.

15. She reviewed Student's educational records, including her school transcript, standardized testing results, 504 plan, and an academic assessment prepared by Educational Specialist Michael Pinto, to understand Student's case history.

16. Ms. Johnson worked with Mr. Pinto on his academic assessment of Student, which was her practice in conducting psychoeducational assessments. She reviewed his results and they discussed their test results with each other.

17. Both Ms. Johnson and Mr. Pinto took input from Student's teachers, although this was primarily Mr. Pinto's area of responsibility. Student's teachers reported that she was an energetic, talkative, and intelligent student who participated in class discussion and worked well in groups. Student did not present a behavior problem in class and appeared to enjoy school.

18. Student's diabetes impacted her academic performance because she would leave class hourly to go to the nurse's office to check her blood sugar levels, and sometimes she would be late to class as a consequence. Student managed her diabetes independently and well. Ms. Johnson's opinion was that the hourly monitoring was unnecessary, but she understood that Student's parents had insisted upon it.

19. Ms. Johnson observed Student in her Marine Science class for approximately 50 minutes. Student arrived late after coming from the nurse's office. Ms. Johnson saw Student participate in class and perform normal classroom tasks, including working without prompting on a warm-up exercise posted on the board. Student volunteered answers, took notes, and recorded the day's homework. Student left the class early to go to the nurse.

20. Ms. Johnson planned a second observation session in Student's English class, but it did not occur.

21. Ms. Johnson described Student from her observation and her interaction with Student in testing as a happy, upbeat, quirky, and highly intelligent young woman.

22. For the psychoeducational assessment, Ms. Johnson employed the following tools: The Cognitive Assessment System, second edition; the Test of Auditory Processing Skills, third edition; the Test of Visual Perceptual Skills, third edition; the Developmental Test of Visual Motor Integration, sixth edition; and the Behavioral Assessment System for Children, second edition.

23. Ms. Johnson easily established rapport with Student for the testing, and found her to be friendly and talkative. Throughout testing, Student worked methodically and carefully and was task-focused.

24. The Cognitive Assessment System evaluates how the brain processes information visually, auditorially, and in non-verbal problem solving, and assesses attentiveness. The test involves the administration of standardized questions which are graded to produce a composite score.

25. Student's overall performance on the Cognitive Assessment System was slightly above average (63rd percentile) as compared to high school students of similar age. Her lowest score was a 94 in simultaneous processing of relationships of shapes or geometrical elements presented visually or verbally, which was within the average range (34th percentile). Her highest score was in successive processing, where she received a 114 that placed her in the "high average" range (82nd percentile).

26. Ms. Johnson administered two sections of the Test of Auditory Processing Skills to assess Student's ability to understand and retain information transmitted phonologically. The test consists of standardized questions which are graded to produce a composite score.

27. Student's auditory memory and cohesion skills were within the average range on all subtests. On that basis, Ms. Johnson found Student's central auditory processing abilities were normal and that there was no indication of a learning disability.

28. Ms. Johnson next administered the Test of Visual Perceptual Skills to determine if Student had a visual processing weakness that might suggest a learning disability. The test has seven subparts which test the ability to visually determine relationships between objects and to retain that information. The test utilized standardized questions posed to Student, whose graded responses produced a composite score.

29. Student's visual perception skills were average. Ms. Johnson noted that Student had some variance in her assessed basic processing skills. Student had strengths in visual discrimination, spatial relationships, and complex processes, but lower abilities in visual memory and form constancy. Ms. Johnson did not consider the inconsistencies in the subtest results as indicative of a learning disability.

30. The Developmental Test of Visual Motor Integration assesses how a student utilizes visual input to govern motor activity. The student must handwrite text and copy symbols or geometric shapes. The output is judged according to standardized criteria.

31. Student had average ability to integrate sight and small-muscle control. Ms. Johnson noted that Student had "very neat handwriting" but "it's just very tiny." The outcome of this test did not suggest to Ms. Johnson that Student had a learning disability.

32. Ms. Johnson administered the Behavioral Assessment System for Children to assist in determining whether Student had any impairment in her social-emotional functioning. The assessment consisted of questionnaires that were given to Student and her parents and teachers. The questionnaires were scored to see if intervention is needed

33. Scores from the test can fall into three categories: average, at-risk, or clinically significant. A score in the at-risk range indicates that the behavior does not need intervention, but that further monitoring may be appropriate. Clinically significant scores may disclose problems requiring care.

34. Ms. Johnson gave the Behavioral Assessment System for Children questionnaires to Student, Student's English teacher, and to Parent. All of the questionnaires were returned and were scored.

35. Student had clinically significant scores in the areas of somatization and locus of control. Ms. Johnson found that these responses did not indicate a need for intervention. Student's somatization issues were largely tied to her diabetic condition. Similarly, she viewed Student's complaints of loss of control over her life and of feeling overworked and frustrated as "typical teenage" responses.

36. Student's teacher reported no scores in the clinically significant range, and only in the at-risk categories for functional communication and depression.

37. The questionnaires returned by Student's Parent put Student in the clinically significant range for somatization, anxiety, atypicality, and daily living activities. Parent's view of Student's functioning was considerably more negative than that of Student or her teacher, and Ms. Johnson accepted that as typical of parental evaluations of their children. Ms. Johnson did not interview Student's parents because they had instructed the IEP team by e-mail that school personnel could not contact parents and could only contact Parents' advocate.

38. Ms. Johnson included the score results from the Behavioral Assessment System for Children in the psychoeducational assessment report. She did not express an opinion about the need for psychological services because that was the responsibility of the individualized educational program team member who was preparing the Mental Health Related Services assessment.

39. Ms. Johnson used the most current version of all assessment instruments when she administered them to Student. All instruments were administered in English, which was Student's primary language. All instruments were reliable and widely accepted assessment tools. The instruments were not racially, culturally, or sexually discriminatory in selection or administration. All instruments were administered and interpreted consistent with the publisher's protocols and yielded valid results. She did not rely on any single measure, tool, or score in making her recommendation for services.

40. The IEP team met to discuss the assessment results on February 9, 2015.² Parents and all required IEP team members attended. Ms. Johnson found that Student did not qualify for special education and related services for specific learning disability, other health impairment, or any other eligibility category. She reported that Student's psychoeducational functioning was at a high level, that there was no discrepancy between her achievement and her abilities, and that Student was not in need of special education and related services to access her education. Parents requested a mental health services assessment following the February 9, 2015, IEP team meeting.

² Ms. Johnson's report is dated February 9, 2015, which she testified was the date of the individualized educational program meeting. The individualized educational program report refers to a multidisciplinary assessment report, including Ms. Johnson's report, dated February 3, 2015. The dating convention discrepancy is not significant.

District's Mental Health Services Evaluation

41. Shamaine Cardoza conducted the mental health services assessment of Student in late March and early April of 2015. Ms. Cardoza is a licensed mental health clinician employed by District since 2012 as part of its centralized assessment team. Ms. Cardoza has a bachelor of arts degree in Psychology from San Francisco State University and a master of arts Degree in Counseling Psychology from Argosy University. She was licensed as a Marriage and Family Therapist in 2008, which credentialed her to work with students.

42. Ms. Cardoza has worked in the field since receiving her master's degree in 2004, and has worked with children since 2006. Prior to working for the District, Ms. Cardoza worked for private behavioral service providers as a case manager, doing assessments, creating individualized plans, and providing support to field behaviorists.

43. Ms. Cardozo has conducted approximately 200 assessments of students over the last two years.

44. She is qualified by her education, training, experience, and credentials to conduct assessments of need for mental health services.

45. Ms. Cardoza conducted the assessment through the use of record review, classroom observation, and interviews of Student, Mother, and Student's teachers.

46. Ms. Cardoza reviewed Student's educational records, including documents held in the school's PowerSchool and Exceed databases. She reviewed Student's February 2015 individualized educational program meeting report, 504 plan, grade and attendance reports, and her psychoeducational, academic, and health assessment reports.

47. Ms. Cardoza observed Student in her Statistics class. Student was well-behaved and engaged in the class. She assisted, interacted with, and worked with her peers. She opted to take a quiz that she could have skipped because she had been absent, rather than defer it over Spring break.

48. Ms. Cardoza interviewed Ms. Johnson, who related the information contained in the psychoeducational assessment. In addition, Ms. Johnson reported that Student was now attending a student support group, where she acted as a peer leader and displayed a very upbeat and empathetic attitude.

49. Student's Statistics teacher reported that Student's attendance was poor, but that she was engaged, participating, and attentive when in class. He recounted one episode when she left class suddenly during a quiz to go to the nurse's office. This was her only unusual action in class. He later learned that she was upset that she might fail his class, which he stated was not likely. Other than her absences from class, which adversely affected her grade, she had no issues in his class.

50. Ms. Cardoza also interviewed Student's Government/Economics teacher, who stated that Student was successful in class, and, although quiet, seemed happy. Student surprised the teacher with the depth of her knowledge. The teacher reported no problems.

51. This teacher completed the Child and Adolescent Systems Inventory, a standardized questionnaire.³ Ms. Cardoza covered the same questions which are on the questionnaire in her interviews of the other teachers, so she did not think it was necessary to give it to them. The questionnaire was used as a tool to initiate conversation about Student.

52. Student's English teacher reported that she was insightful and passionate, but that her grades were lower than they should have been. The teacher felt that English was Student's strong suit, but noted that she had been getting Cs and Ds on tests. In addition, although Student would turn in draft writing assignments early, she would not edit the drafts to implement suggested changes.⁴ Other than that, the teacher did not see any emotional or behavioral issues with Student.

53. The school nurse verified that Student would go to her office to monitor her insulin hourly. Student was responsible and careful in controlling her diabetes, and her mood was generally excited and dramatic. She corroborated the story that Student had once come to her office in tears. In her opinion, Student was suffering typical Senior year stress.

54. Ms. Cardoza interviewed Student. Student was friendly, communicative, and intelligent. She discussed her friends, her extracurricular activities, and her health issues. Student said she enjoyed Art class, Marine Science, and Drama, and had been in several school plays.

55. Student said she had friends at school and would do things with them on the weekends. She said her parents trusted her to manage her diabetes when she was out on weekends. She did not feel it was necessary for her to visit the nurse's office hourly. Her goal upon graduation was to attend college.

56. Student described her mood and demeanor as "hella chill," but admitted that it was a struggle to do well in school. She denied having mood issues or problems with anxiety. She denied having any suicidal or homicidal ideation, hallucinations, or drug or alcohol abuse.

³ The questionnaire was also given to Student's Statistic's teacher, but it was not returned until after Ms. Cardoza completed her report. The results were similar.

⁴ School Principal Elizabeth Gillingham testified that English class was an issue of contention between the administration and Student's parents. She testified that it became the "plan" of Student's parents and the advocate for Student to fail English so as to justify services. Nothing in Ms. Cardoza's testimony reflected awareness of this allegation.

57. Student's mother arrived at the end of her interview, and Student was reluctant to have her join the interview. Seeing Student's aversive affect, Ms. Cardoza had Mother join to observe their dynamic.

58. Mother told Ms. Cardoza that Student had behavioral issues at home. Specifically, Mother said that Student had "hoarding behaviors" and never threw things away. This discussion bothered Student, and she shook her head and then voiced her disagreement. Her Mother continued to talk over her without acknowledging her disagreement. Mother said Student was disorganized, and complained that when she returned from grocery shopping her children would eat the food all at once and not "conserve" it.

59. Mother reported that Student did not have any mood issues or suicidal ideation, unlike her brother. Student stated that she did not get along well with her brother, and that she coped with her family situation by distancing herself when there was conflict. She stated that she "had difficulty hearing compliments" from her parents. Mother told Ms. Cardoza outside of Student's presence that she did not trust Student to manage her diabetes on weekends, but felt that there was no alternative.

60. Ms. Cardoza felt that Student had good coping skills, and did a great job of advocating for herself without escalating the situation. Ms. Cardoza also observed that Student was confused, not defensive, when her Mother described her as having a hoarding problem. Student acted as if the accusation was incomprehensible to her.

61. Ms. Cardoza accepted Student's reports of irregular sleeping schedules, and her absences from, and tardiness to, class, as an aspect of her teenage life. Ms. Cardoza considered whether these might be manifestations of a mental health issue but dismissed the possibility because such symptoms were contradicted by Student's other behaviors. Student's ability to focus, concentrate, make friends, and to participate in extracurricular activities, and her lack of mood issues convinced Ms. Cardoza that she did not have an issue.

62. The IEP team met to discuss the assessment results on May 13, 2015. Parents and all required IEP team members attended. Ms. Cardoza reported her opinion that Student had no need for mental health services. Her assessment report recommended that Student not receive school-based mental health related services.

63. Parents did not consent to the May 13, 2015, individualized educational program report. The explanation of the withholding of consent in the report states "Parent believes [Student] should qualify for Special Education Services. Parents request an IEE (Independent Educational Evaluation) for Mental Health Eligibility."

LEGAL CONCLUSIONS

*Introduction: Legal Framework under the IDEA*⁵

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and the California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁶ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means that special education and related services are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56502, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, District had the burden of proof on all issues.

Issues 1 and 2: District's Psychoeducational and Mental Health Services Assessments

5. District contends that its assessments were lawfully administered by qualified assessors. For these reasons, District asserts that it is not obligated to fund independent psychoeducational and academic evaluations for Student.

6. Under certain conditions, a student is entitled to obtain an independent educational evaluations at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

7. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

8. Based upon the foregoing authority, District timely filed a request for due process hearing to show that its assessments were appropriate. Parents requested independent psychoeducational and mental health services assessments at the IEP team meeting on May 13, 2015. On May 21, 2015, District responded to this request by filing the complaint for this matter. District's filing to defend its assessments within eight days of Student's request for independent educational evaluations does not constitute an undue delay.

9. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.)⁷ Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

10. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Under federal law, an assessment tool must provide relevant information that directly assists persons in determining the educational needs of the child. (34 C.F.R. § 300.304(c)(7).) In California, a test must be selected and administered to produce results that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed in all areas related to a suspected disability. (Ed. Code § 56320, subd. (c), (f).)

11. Assessments must be conducted by individuals who are both knowledgeable of the student's disability and competent to perform the assessment, as determined by the school district, county office, or special education local plan area. (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).)

⁷ An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

12. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

13. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

THE PSYCHOEDUCATIONAL ASSESSMENT

14. District's February 9, 2015, psychoeducational assessment was appropriate. Responding to Parents' request for assessment, the District cooperated with Parents, prepared an agreed-upon assessment plan, and conducted a comprehensive and thorough assessment that assessed Student in all areas related to suspected disability. The assessment was performed by a licensed school psychologist. As to all the assessment instruments used in the psychoeducational assessment, District established that the test instruments were properly normed, and not racially, culturally, or sexually biased. Ms. Johnson used the instruments for the purposes for which they were designed, she was qualified to administer the assessment tools, and properly did so. Ms. Johnson prepared a report summarizing her findings and making recommendations, which was shared with parents and the IEP team and discussed at the IEP meeting. Accordingly, District's psychoeducational assessment was appropriate, and Student is not entitled to an independent educational evaluation at public expense.

THE MENTAL HEALTH SERVICES ASSESSMENT

15. District's April 2, 2015, mental health related services assessment was appropriate. In response to Parents' request for assessment, the District cooperated with Parents, prepared an agreed-upon assessment plan, and conducted a comprehensive and thorough assessment that assessed Student in all areas related to Student's suspected needs. Ms. Cardoza did not administer any psychological tests. Her technique of review, observation, and interview of students, family, and teachers is one for which she was qualified, knowledgeable, and competent. Ms. Cardoza prepared a report summarizing her findings and making recommendations, which was shared with parents and the IEP team and discussed at the IEP meeting. Accordingly, District's mental health related services assessment was appropriate, and Student is not entitled to an independent educational evaluation at public expense.

Issue 3: Student's Eligibility

16. District contends that it may obtain a determination that it appropriately found Student ineligible for special education and related services under the categories of Specific Learning Disability, Other Health Impairment, and Emotional Disturbance.⁸

17. As noted above, the IDEA allows parents or local educational agencies to obtain an impartial due process hearing with respect to any matter relating to the identification a child for special education services, including “proposal to initiate or change the identification” or a “refusal to initiate or change the identification” of a child for special education services. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) District has filed this matter concerning its own refusal to initiate the identification of Student for special education services.

18. The record is unclear whether Student or Parents have ever asserted that she should be identified to receive special education services. Parents did request an independent educational evaluation for “mental health eligibility” at the May 13, 2015, individualized educational program meeting. As Student has not retained counsel or participated in this matter, District’s assertions are not controverted.

19. Assuming from Student’s default in this matter that District is correct that there is a live case or controversy between the parties over Student’s identification for special education services, this matter would neither be moot nor an attempt to obtain an improper advisory opinion.⁹

20. California Code of Regulations, title 5, section 3030 (“Section 3030”) includes a list of conditions that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by “the degree of the pupil’s impairment.”

21. A Specific Learning Disability is a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do

⁸ District does not use the eligibility category “emotional disturbance” in its briefing, and only asks in its Amended Due Process Hearing Request that OAH find that “Student is not a child with a disability under the IDEA.” To analyze District’s argument, it is assumed that District is referring to emotional disturbance eligibility.

⁹ It is unclear whether District could have initiated an action over its refusal to find Student eligible for special education services if Student had not challenged the determination.

mathematical calculations. (20 U.S.C. § 1401(30)(A); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd.(a).) It also includes disability within the field of vision which results in visual perceptual or visual motor dysfunction. (Ed. Code, § 56337, subd.(a).)

22. A school district shall determine if a child has a specific learning disability using one of two methods: the severe discrepancy method, or the response to intervention method. (20 U.S.C. § 1414(b)(6); 34 C.F.R. §§ 300.307, 300.309(a)(1) & (2); Ed Code, 56337, subds. (b), (c).) The severe discrepancy method requires that a student has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); Ed. Code, § 56337, subd. (b)[authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) The response to intervention method allows a district to assess if the pupil responds to scientific, research-based intervention. (Ed Code, § 56337, subd. (c).)

23. Section 3030, subdivision (b)(9), defines Other Health Impairment as a condition resulting in limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that both is due to chronic or acute health problems and which adversely affects a child's educational performance.

24. Section 3030, subdivision (b)(4), defines a child with emotional disturbance as exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (a) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (c) inappropriate types of behavior or feelings under normal circumstances; (d) a general pervasive mood of unhappiness or depression; (e) a tendency to develop physical symptoms or fears associated with personal or school problems; and (f) emotional disturbance includes schizophrenia.

25. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(1) & (2); 300.306(a)(1); Ed. Code, § 56026, subd. (a).)

26. The February 9, 2015, psychoeducational assessment was appropriately conducted. In that report, Ms. Johnson stated that Student was "not currently demonstrating any processing deficit nor is there any discrepancy between her ability and achievement. Therefore, [Student] is not eligible for special education services under Specific Learning Disability at this time."

27. Ms. Johnson's assessment further stated that, "while [Student] has a medical diagnosis of diabetes, she is not eligible for special education services under Other Health Impairment at this time, due to no adverse impact on her academic performance."

28. In the eight-line Summary and Eligibility Statement in the individualized educational program report of the meeting held February 9, 2015, it states that “[Student] did not demonstrate and *[sic]* processing deficits and there is no severe discrepancy between her ability and achievement at this time. She is not eligible for SpEd under SLD.” There is no other discussion of the issue. It then reports “Standardized auditory processing suggests results consistent with Decoding and Binaural Integration deficit.” No explanation is given for this apparent inconsistency.

29. District did not present evidence regarding the deliberative and weighing process conducted by the IEP team regarding this issue. Although Ms. Johnson was present at the meeting, she did not testify about any discussion conducted among the team members regarding the Parents’ concerns and observations, the assessment, and the application of the statutory standards to Student’s condition. Ms. Gillingham, District’s third and final witness, was also present at this meeting, but also did not testify on this matter.

30. The Summary and Eligibility Statement reports the following regarding Student’s health: “While [Student] has diabetes and other health needs, again, she is meeting grade level standards and her 504 accommodations appear to be working at this time. There is no severe academic discrepancy due to medical/health needs at this time and therefore she is not eligible for SpEd under OHI at this time.”

31. Neither Ms. Johnson nor Ms. Gillingham testified regarding the IEP team’s determination of Student’s ineligibility due to other health impairment. Another section of the February 9, 2015 report refers to a nurse’s report for more information, but that report is neither attached to the team’s report nor discussed therein.

32. Neither the meeting of grade levels nor the lack of a “severe academic discrepancy” are part of the statutory criteria used to evaluate whether or not a student qualifies for special education services under other health impairment.

33. Ms. Cardoza’s April 2, 2015 mental health related services assessment was appropriately conducted. In her report, Ms. Cardoza expresses no opinion and makes no recommendation whether Student suffers from an emotional disturbance disability. Her “Educationally Related Recommendations” states only that “[a]fter careful assessment and review of [Student’s] current level of functioning, academically, emotionally, and behaviorally, *[sic]* it is the recommendation that [Student] not receive school-based Mental Health Related Services at this time.”

34. Ms. Cardoza’s report was given to the IEP team at the May 13, 2015 meeting. The sole mention of the report occurs in the present levels of performance section dealing with social/emotional/behavioral skills. It reads, in full: “[Student] is a very social and happy young lady. She has made friends on campus and is well liked by teachers and peers. Overall, she likes [her current school] better than her old school because it is more exciting,

there are things to do, and the teachers instruct better. See Mental Health Clinician's Assessment Report." There is no discussion of the issue of Student's eligibility due to an emotional disturbance disability. That disability is mentioned only obliquely, in the "District Response" box: "[Student] does not qualify for Special Education Services per completed assessments including the district MHRS assessment."

35. District did not present evidence regarding the deliberative and weighing process conducted by the individualized educational program team regarding this issue. Ms. Cardoza, Ms. Johnson, and Ms. Gillingham were all present at the May 13, 2015 meeting. None testified about any discussion conducted among the IEP team members regarding the Parents' concerns and observations, the assessment, and the application of the statutory standards to Student's condition.

36. There are no notes or other narrative attached to the IEP report. Nowhere in the report is there any support for the contention that the team members gave independent consideration of Student's eligibility for special education or that there was any weighing of the statutory factors as to any disability category.

37. It is as likely that the team uncritically adopted Ms. Johnson's recommendation to deny Student's eligibility as it is that they properly gave her case individual and collaborative attention. The unresolved question regarding the effect and extent of Student's auditory processing deficit does not imply careful consideration of the issue.

38. Similarly, the importation of grade-level standards and "severe academic discrepancy" into the discussion regarding other health impairment disability puts the team's denial of eligibility in question. There is a significant possibility that the correct standards were not employed in making the determination.

39. Ms. Cardoza's report did not make a recommendation regarding Student's eligibility under the emotional disturbance category. It appears, however, that the team entirely deferred to the report. This is compounded by the entire omission of the words "emotional disturbance" from the individualized educational program report.

40. It is the statutory responsibility of the IEP team to determine whether a student is eligible for special education and related services. The decision must be made by the team collaboratively and in conformance with the statutory standards. On the evidence presented, it is not proven that this was done. It appears that the team abdicated its responsibilities and adopted the assessor's recommendation as to Student's eligibility under the specific learning disability and other health impairment categories. There is no persuasive evidence that the team made any determination regarding student's eligibility due to an emotional disturbance disability.

41. District has not carried its burden of proving that it appropriately found that Student was not eligible for special education related services pursuant to the May 13, 2015 individualized education program report.

ORDER

1. District's February 9, 2015 Psychoeducational Assessment and April 2, 2015 Mental Health Related Services Assessment were appropriate and District is therefore not required to fund independent educational evaluations related to these assessments.

2. District's request for a ruling that District appropriately found Student ineligible for special education services is denied.¹⁰

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District was the prevailing party on the first two issues presented. Student prevailed on Issue 3.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: August 24, 2015

/s/

CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings

¹⁰ It should be noted that this decision should not be considered for the proposition that Student is eligible for special education services, as Student would need to file her own request for hearing on that issue as no finding is made in this decision that she is eligible for special education and related services.